# INDEX



## CITATIONS





739901—47——1

# In the Supreme Court of the United States

OCTOBER TERM, 1946

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No. 1159

C. C. CLARK, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the District Court (R. 38–40) is not reported. The opinions of the Circuit Court of Appeals (R. 47–54) are reported in 159 F. 2d 489.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 23, 1947. (R. 54.) The petition for a writ of certiorari was filed on March 26, 1947. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Is the final decision in the suit for the recovery of an overpayment of surtaxes for 1937 in *C. C. Clark, Inc.* v. *United States*, 126 F. 2d 292 (C. C. A. 5th), *res judicata* of the same taxpayer's present suit for the recovery of an overpayment of surtaxes for 1937?

## STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 14. SURTAX ON UNDISTRIBUTED PROFITS.

(a) *Definitions.*—As used in this title—

(1) The term "adjusted net income" means the net income minus the sum of—

(A) The normal tax imposed by section 13.

(B) The credit provided in section 26 (a), relating to interest on certain obligations of the United States and Government corporations.

* * * * *

(2) The term "undistributed net income" means the adjusted net income minus the sum of the dividends paid credit provided in section 27 and the credit provided in section 26 (c), relating to contracts restricting dividends.

(b) *Imposition of Tax.*—There shall be levied, collected, and paid for each taxable year upon the net income of every corporation a surtax equal to the sum of the following, subject to the application of the specific credit as provided in subsection (c):

7 per centum of the portion of the undistributed net income which is not in excess of 10 per centum of the adjusted net income.

12 per centum of the portion of the undistributed net income which is in excess of 10 per centum and not in excess of 20 per centum of the adjusted net income.

17 per centum of the portion of the undistributed net income which is in excess of 20 per centum and not in excess of 40 per centum of the adjusted net income.

22 per centum of the portion of the undistributed net income which is in excess of 40 per centum and not in excess of 60 per centum of the adjusted net income.

27 per centum of the portion of the undistributed net income which is in excess of 60 per centum of the adjusted net income.

*  *  *  *  *

SEC. 26. CREDITS OF CORPORATIONS.

In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

*  *  *  *  *

(c) *Contracts Restricting Payment of Dividends*—

*  *  *  *  *

(2) *Disposition of Profits of Taxable Year.*—An amount equal to the portion of the earnings and profits of the taxable year which is required (by a provision of a written contract executed by the corporation

prior to May 1, 1936, which provision expressly deals with the disposition of earnings and profits of the taxable year) to be paid within the taxable year in discharge of a debt, or to be irrevocably set aside within the taxable year for the discharge of a debt; to the extent that such amount has been so paid or set aside. For the purposes of this paragraph, a requirement to pay or set aside an amount equal to a percentage of earnings and profits shall be considered a requirement to pay or set aside such percentage of earnings and profits. As used in this paragraph, the word "debt" does not include a debt incurred after April 30, 1936.

* * * * *

SEC. 27. CORPORATION CREDIT FOR DIVIDENDS PAID.

(a) *Dividends Paid Credit in General.*—For the purposes of this title, the dividends paid credit shall be the amount of dividends paid during the taxable year.

* * * * *

(d) *Dividends in Obligations of the Corporation.*—If a dividend is paid in obligations of the corporation, the amount of the dividends paid credit with respect thereto shall be the face value of the obligations, or their fair market value at the time of the payment, whichever is the lower. If the fair market value is lower than the face value, then when the obligation is redeemed by the corporation, the excess of the amount for which redeemed

**over the fair market value at the time of the dividend payment (to the extent not allowable as a deduction in computing net income for any taxable year) shall be treated as a dividend paid in the taxable year in which the redemption occurs.**

* * * * *

## STATEMENT

The essential stipulated facts, found by the District Court, are these (R. 17–22, 40):

In the latter part of December, 1937, the petitioner, hereinafter called the taxpayer, declared a dividend to its stockholders in the amount of $118,500 payable in its own notes out of undistributed profits. Thereafter, in the early part of 1938, by appropriate resolution, the taxpayer cancelled the dividend declared by it in 1937 and declared as a substitute therefor a dividend of $88,500 which it paid in cash. Thereupon, it filed its income tax return for the year 1937 and claimed as a credit in the computation of surtax on undistributed profits, $88,500 in dividends under Section 27 (a). At Item 28 of the return no credit for contracts restricting dividend payments was taken, although at Item 13 on the return of personal holding company which was filed for 1937, the figure of $30,000 was shown as an "amount used or irrevocably set aside to pay or retire indebtedness of any kind incurred prior to January 1, 1934." (R. 17–18.)

Thereafter, the taxpayer was advised that in the computation of its surtax on undistributed

profits for the calendar year 1937 it was entitled to a credit, in addition to the $88,500, of the $30,000 debt payment (described in the preceding paragraph) pursuant to the provisions of Section 26 (c) (2) of the Revenue Act of 1936. Accordingly, it filed its claim for refund on December 8, 1939, for the recovery of surtaxes on undistributed profits in the amount of $3,326.11 claimed to have been overpaid for 1937 by reason of its failure to take as a credit the $30,000 debt payment in the computation of its surtaxes on undistributed profits. (R. 18.)

The claim for refund was rejected by the Commissioner of Internal Revenue on May 15, 1940, and thereafter suit was instituted in June, 1940, by taxpayer against the United States for the recovery of surtaxes on undistributed profits resulting from the disallowance of the $30,000 debt payment. (R. 19.)

The suit was heard by the District Court which handed down its decision on October 17, 1940, rejected the grounds of suit, and entered judgment against the taxpayer. The taxpayer thereupon appealed to the court below which, on March 3, 1942, affirmed the decision of the District Court. The opinion of the Circuit Court of Appeals is reported in *C. C. Clark, Inc.* v. *United States*, 126 F. 2d 292. (R. 19.)

After the institution of the above-described suit in the District Court by the taxpayer, but before that court's decision in such suit, the

Revenue Agent in Charge at New Orleans proposed in an investigating agent's report dated August 14, 1940, additional individual income taxes for 1937 on the stockholders of taxpayer based on the determination that the taxpayer paid dividends to its stockholders in 1937 in the total amount of $118,500. All of the six stockholders of taxpayer, except Charles C. Clark, had reported in their individual returns for 1937 their proportionate shares of total dividends of $88,500. Charles C. Clark reported his proportionate share of dividends in the total amount of $118,500. (R. 19–20.) Copies of the Revenue Agent's report proposing the foregoing additional individual income taxes on five of the six stockholders were received and receipted for on September 10, 1940, by the stockholders' attorney, F. E. Hagler, who, on the same day, filed protest against the proposed assessment of taxes against the five individual stockholders. Such protest was rejected and on or about December 6, 1940, the proposed additional taxes were assessed and all were paid on or about December 12 and 13, 1940. (R. 20.)

On or about January 3, 1941, the taxpayer filed with the Collector of Internal Revenue for the District of Mississippi its claim for refund of $3,337.28 of surtaxes on undistributed profits paid by it for the calendar year 1937. The basis of this claim was that taxpayer had distributed $118,500 in dividends to its stockholders, who had

been required to pay individual income taxes on such amount, but that taxpayer had been allowed a dividends-paid credit of only $88,500, and that taxpayer was entitled to the exact amount of dividends credit which its individual stockholders were required to pay taxes on as dividends. (R. 20–21.)

This second claim for refund was rejected and the taxpayer brought this suit for the recovery of the taxes claimed. (R. 21.) The District Court rejected the Government's contention that the final decision in the taxpayer's first suit for the recovery of an overpayment of surtaxes for 1937 was *res judicata* of its second suit for the recovery of an overpayment of surtaxes for 1937 and entered judgment for the taxpayer. (R. 38–41.) The Circuit Court of Appeals sustained the Government's contention and reversed.

## ARGUMENT

1. The court below correctly decided that its earlier decision in *C. C. Clark, Inc.* v. *United States*, 126 F. 2d 292, was *res judicata* of the taxpayer's claim in the present suit and barred recovery, since the second suit arises on the same cause of action as the first, asserting a ground of recovery which could have been litigated in the first suit.

It has long been established that a litigant "is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of

the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible, * * *." *Stark* v. *Starr*, 94 U. S. 477, 485. With respect to a single cause of action "an adjudication bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised." *Angel* v. *Bullington*, No. 31, this Term, decided February 17, 1947, by this Court, not yet officially reported, slip sheet, p. 2. The same is true in tax cases. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 623.

It has been equally well established that income tax liability for any one year constitutes a single cause of action. Thus, in a suit for refund, even against the Collector, a taxpayer is not entitled to recover on the item of overpayment to the extent that it can be shown that there are any other items for the same year however unrelated and though otherwise barred by the statute of limitations, with respect to which he has underpaid his tax. *Lewis* v. *Reynolds*, 284 U. S. 281. And it has been held in other circumstances that the claim that the income tax for a single year has been overpaid constitutes but one cause of action. *International Curtis Marine Turbine Co.* v. *United States*, 56 F. 2d 708, 710 (C. Cls.); *Chicago Junction Rys., etc.* v. *United States*, 10 F. Supp. 156 (C. Cls.); *American Woolen Co.* v.

*United States,* 18 F. Supp. 783 (C. Cls.), affirmed on rehearings, 21 F. Supp. 125, 1021, certiorari denied, 304 U. S. 581. Accordingly, it has been held consistently in such cases and others that a judgment in a former suit for refund is a bar to a subsequent suit for refund of income taxes for the same year notwithstanding the fact that the ground for recovery urged in the second suit had not been presented in the first. *Worm* v. *Harrison,* 98 F. 2d 977 (C. C. A. 7th); *Bowe-Burke Mining Co.* v. *Willcuts,* 45 F. 2d 394 (Minn.); *Western Maryland Ry. Co.* v. *United States,* 23 F. Supp. 554 (Md.). See also *Bertelsen* v. *White,* 58 F. 2d 792 (Mass.), affirmed on other grounds, 65 F. 2d 719 (C. C. A. 1st).

Both suits here involved were for income taxes for 1937 and more particularly for surtax on undistributed profits. (R. 17, 19.) As such both suits constituted a single cause of action. And as the court below noted (R. 50), there never was any impediment to the taxpayer's seeking recovery on the basis of a credit under Section 27 (a) which the taxpayer now puts in issue.[1] Instead the taxpayer chose to confine its first suit to a claim for credit under Section 26 (c) (2). All the substantive facts on which the second suit

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[1] The taxpayer had until two years after the rejection of the first claim for refund, or until May 15, 1942, to bring suit on the grounds urged in both claims for refund. Section 3226, Revised Statutes, as amended by Section 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and Section 807 of the Revenue Act of 1936.

was based had occurred prior to the institution of the first suit.

As recognized below (R. 50), the fact that this suit is based on a different claim for refund cannot split the cause of action since that claim is simply an administrative procedural step in asserting the cause of action. *Guettel* v. *United States,* 95 F. 2d 229 (C. C. A. 8th), certiorari denied, 305 U. S. 603.

The rule against splitting a cause of action is particularly applicable in the case of federal income taxes. The very complexity of the comprehensive system of review Congress has established with respect to tax litigation makes it highly improbable that Congress could have intended to permit a taxpayer to contest liability for the same tax year in more than one forum or to bring successive suits in the same forum.

To allow the taxpayer to split its cause of action for the recovery of income taxes for 1937 into as many suits as there are grounds that the statute of limitations permits would defeat the very purpose of the doctrine of *res judicata.*

The question involved having been correctly determined by the court below, applying principles stated by this Court, and in accord with the uniform decisions of a number of other courts lacks such importance as would call for a further review by this Court.

2. The decision below is not in conflict with *Magruder* v. *Safe Deposit and Trust Co. of Balti-*

*more*, decided February 3, 1947, by the Circuit Court of Appeals for the Fourth Circuit (1947 P-H, par. 72, 348). The question there involved was whether a judgment on a suit for the refund of estate taxes is *res judicata* and a bar to a second suit for the refund of estate taxes based upon the deductibility of attorney's fees incurred in the first action. It is doubtful whether that decision disturbed the principle that in applying the doctrine of *res judicata* in cases involving estate taxes, the liability of an estate for such tax constitutes a single cause of action. *Guettel* v. *United States*, 95 F. 2d 229 (C. C. A. 8th), certiorari denied, 305 U. S. 603; *Cleveland* v. *Higgins*, 148 F. 2d 722 (C. C. A. 2d), certiorari denied, 326 U. S. 722. The decision of that court that the second suit for estate taxes was not barred by the judgment in the first suit was predicated on the conclusion that the amount of the attorney's fees was not ascertainable with sufficient degree of certainty to permit its presentation as a ground for recovery in the first suit. The same question was decided with the opposite result in *Cleveland* v. *Higgins, supra*, based upon the conclusion of that court that in that case the attorney's fees were ascertainable with sufficient certainty to permit a claim for the deduction being made a ground of recovery in the first suit.

It is believed that in *Cleveland* v. *Higgins, supra*, the court reached the correct result on the

preliminary question which had to be decided before it could be ascertained whether the doctrine of *res judicata* was applicable, that is, whether the claim asserted in the second suit could have been presented in the first suit. On the other hand *Magruder* v. *Safe Deposit and Trust Co.* appears to have reached an erroneous conclusion on the same question.

No such question as exists in the *Cleveland* and *Safe Deposit* cases, *supra,* is presented in the two suits for the recovery of income taxes involved in the instant controversy. Here there was no bar to the taxpayer filing a claim for refund at any time after the payment of its tax for 1937 based upon its presently asserted claim for credit under Section 27 (a), as well as its claim for credit under Section 26 (c) (2) to which the first suit was confined, and litigating both claims for credit in the same suit. The ground of recovery in the second suit was not in any wise related to the determination of the first suit as was believed to be the case in *Magruder* v. *Safe Deposit and Trust Co. of Baltimore, supra.*

3. There are no equitable considerations existing in fact or sufficient in law which preclude the application of the doctrine of *res judicata* to the instant suit. The bar to a second suit on the same cause of action under the doctrine applies without regard to the merits of the claim set forth in that second suit.

The fact that the taxpayer may have been mistaken or ignorant of its rights does not excuse

the failure to make the claim in the first suit. *Guettel* v. *United States, supra; International Curtis Marine Turbine Co.* v. *United States, supra.* The Commissioner was under no duty to advise the taxpayer to file a claim for refund on the claim for credit here asserted, particularly in the absence of any definitive determination that the stockholders' tax liability would be closed on the basis of the $118,500 dividend. Cf. *Okonite Co.* v. *Commissioner,* 155 F. 2d 248, 253 (C. C. A. 3d); *Gaylord* v. *Commissioner,* 153 F. 2d 408, 416 (C. C. A. 9th).

Moreover, far from being uninformed, the taxpayer was advised on May 25, 1940, prior to the institution of the first suit and, again, on September 10, 1940, prior to the trial and decision in the first suit, that the Commissioner of Internal Revenue proposed to redetermine the stockholders' liability on the basis of the $118,500 dividend in notes rather than the substitute $88,500 cash dividend. (R. 19–20, 35–38.)

Furthermore, the taxpayer's present position may have been due to its effort to obtain a tax advantage. It is significant that by rescinding the dividend declaration in the amount of $118,-500, replacing it with a dividend declaration of $88,500, and making up the difference by a claim of a $30,000 credit under Section 26 (c) (2) of the Revenue Act of 1936, *supra,* the taxpayer was in a position to claim total credits of $118,500 and at the same time possibly relieve the stock-

holders of a dividend liability to the extent of $30,000. The taxpayer figured that it needed only $118,500 to escape the personal holding company tax (R. 24), so when it determined that it could claim a $30,000 credit on another ground, it called another meeting and reduced the original dividend by that amount (R. 25).

Accordingly, when the first suit was submitted the taxpayer was claiming two credits, totaling $118,500. It did not claim, as it could have, $30,000 additional based on the full amount of the original dividend on which it now seeks relief. Having unsuccessfully pursued its original course, the taxpayer now asks this Court for a second opportunity to make the present claim.

## CONCLUSION

The decision below is correct. There is no conflict of decision. The question under the facts involved is not of sufficient general importance to warrant further review. Hence, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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